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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

FEDERAL TRADE COMMISSION,
Petitioner,

vs.

ALGOMA LUMBER COMPANY, et al.,
Respondents.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

RESPONDENTS' REPLY TO BRIEF OF AMICUS CURIAE.

WARREN OLNEY, JR.,
ALLAN P. MATTHEW,
CARL I. WHEAT,
McCUTCHEN, OLNEY, MANNON & GREENE,
Balfour Building,
San Francisco, Calif.,
Attorneys for Respondents.

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INDEX.

	Page
Introductory	1
I. The Public Interest	3
II. Respondent's Trade Name "California White Pine" is Not Misdescriptive and Its Use is Not Unfair	5
III. Current Meaning of "White Pine"	8
IV. The Word "California" in Respondents' Trade Name is Sufficiently Distinctive	9
V. Quality and Utility	10
VI. The Status of Competitors	10
VII. The Opinion of the Court Below	11
Conclusion	13

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INTRODUCTORY.

The brief of *amicus curiae* has been so lately filed as to preclude extended reply within the time now available to respondents. Under the circumstances we are content to permit our brief in reply to the brief for the Federal Trade Commission to serve likewise as our reply to the brief of

amicus curiae. We shall take note here only of such matters as may seem to require separate response.

The brief of *amicus curiae* is characterized throughout by prodigal references to the trade name "California White Pine" as "misrepresentation," "false description," "instrument of fraud," "deception" and "fraudulent." *The record warrants no such characterization and no citations to the record are offered in support.*

There is no finding or suggestion of fraud, dishonesty or deception in any respect in the Commission's "Findings as to the facts" (R. 28 to 44). Moreover, the brief of *amicus curiae* inconsistently admits that the name "California White Pine" was honestly adopted. It is stated (p. 5) "While in this case, *as was found,* the term 'California White Pine' may originally have been used to distinguish Ponderosa Pine from Southern Yellow Pine, * * * " (Emphasis supplied). In the brief of counsel for the Commission before that body it was admitted (p. 87):

> "There is no proof that the practice of designating *ponderosa* by terms including the word 'white' was adopted for the purpose of misleading or deceiving the trade or the public."

A similar admission apears in the brief for the Commission in the Circuit Court of Appeals (p. 80).

The argument of *amicus curiae* is rested upon the assumption that, in order to be lawful, the *commercial* grouping or classification of *pine lumbers* must necessarily conform with the *botanical* grouping or classification of the *pine trees* from which the lumber is produced. The fact is that the trade has little interest in and less knowledge with respect to botanical groupings or classifications of trees. The Commission has so found. (R. 39.) It is concerned only with commercial nomenclature which will fairly characterize the qualities and uses of the particular lumber. The brief of *amicus curiae* disregards this distinction. The record shows that "California White Pine" is truly de-

scriptive of the lumber yielded by Pinus ponderosa in view of its physical properties and industrial utility and that it belongs in the white pine group by virtue of these qualities. The term has no botanical significance.

I.

The Public Interest.

There is no tangible evidence of record that respondents' use of "California White Pine" works injury to the public or to respondents' competitors. There is some assertion by hostile witnesses to that end, but no concrete cases have been presented. Specifically we note the following:

(a.) *No user of this lumber* has testified that he has been led by this trade name to purchase lumber which otherwise he would not have bought.

(b.) *No wholesale or retail dealer* has testified that he has been deceived by this name into purchasing lumber which otherwise he would not have ordered. (The Commission called fifty-two such dealers to the witness stand.)

(c.) *No architect,* out of the thirty architects summoned by the Commission, has testified that he has been influenced by this trade name to specify respondents' lumber, and that otherwise he would not have specified it.

(d.) *No remanufacturer* has testified to such effect, and it should be understood that this lumber now supplies the bulk of the requirements of the remanufacturing industries. Mr. Frederick Weyerhaeuser, who may fairly be styled our principal opponent, has testified explicity that he has no doubt that "the remanufacturers of lumber, such as the manufacturers of sash and doors, understand fully that they are getting a lumber, under the name of California White Pine, which is yielded from the Ponderosa pine tree." (R. 1282)

The precise truth respecting the current lumber situation is that "Northern White Pine" has become so scarce, and its quality has so declined, that it can supply only a minor fraction of the requirements of trade and industry. (R. 279-80; 489; 571; 575; 628; 631; 735; 1294; 1608) Mr. Weyerhaeuser admits that the larger factories now obtain the bulk of their lumber from the Pacific Slope States (R. 1295), and that there has been a "natural economic replacement" of Strobus pine lumber with western pine. (R. 1296) He also testifies that Idaho White Pine yields little lumber of the "shop type" (R. 1296) and believes it to be "quite natural that the ponderosa pine lumber should supply the needs of the remanufacturers in the Middle West engaged in making sash and doors and other materials from shop lumber" (R. 1296). He expects that, irrespective of trade nomenclature, "the bulk of the shop trade will be supplied, as now, with ponderosa pine lumber" * * * "except as coast fir may make inroads on it." (R. 1301.)

Sugar pine lumber cannot supply the shop demand. Its annual cut is about 10 per cent of the ponderosa cut. (Commission's findings, R. 32, 33.) The Commission also finds that "There is a tendency for sugar pine to become a specialty wood." (R. 32.)

These are the substantial and controlling facts, established mainly by the testimony of our adversaries. They should serve to destroy the persistent representation that this lumber has acquired its dominating position by "misuse" of a trade name and by practices characterized as "substitution". The truth is that this lumber has attained dominance because it alone can meet the requirements and supply the demands of trade and industry. If this be "substitution", it is wholly proper and lawful, and no wrong is done either to respondents' competitors or the public.

II.

Respondents' Trade Name "California White Pine" is Not Misdescriptive and Its Use is Not Unfair.

Respondents' trade name here under review is "California White Pine" and not merely "White Pine" as the opposing brief constantly implies.

The argument tendered by our adversaries may well give rise to the inference that respondents are attempting to defend misdescription and misrepresentation in trade nomenclature. Such is not respondents' position. We deny misdescription and we deny misrepresentation. The name was not assumed as a disguise. We insist that this name truthfully denotes the essential properties and the industrial utility of this lumber and that it serves adequately as a particular identification.

The charge that the name is false and deceptive and that "it is an artifice by which one group of traders secure for themselves custom which, but for it, would probably come to another group" is wholly gratuitous. It has no support in the findings of the Commission. We may search the findings of the Commission in vain for anything tending to show that this trade name is an "artifice" by which respondents seek to obtain trade belonging to others.

The undisputed circumstances under which this name came into being completely acquit these respondents of any design to "trade on another's name" or to "pass off" their lumber for another's product. The name was adopted, as the record shows without conflict, not merely because it had long been in use locally in the Pacific coastal area, but in order to distinguish this lumber from the typical yellow pine lumbers of the southern states. This was a proper purpose. The motive was to avoid confusion, and that motive is still present.

Our adversaries affect to find improper purpose in the respondents' desire to perpetuate this name because it associates the lumber with the other white pine lumbers of

commerce. The argument is not only strained but it plainly distorts the facts. We may again point out that there are but two groups of pine lumbers known to trade and industry—viz., the white pine group and the yellow pine group. Respondents are entitled to a name which will place their lumber in one of these two groups. A white pine name is appropriately indicated because the lumber is of the white pine type and goes into the characteristic white pine uses. Assuredly no improper motive can be ascribed to respondents because they seek to perpetuate a name which truthfully characterizes the properties and uses of their product.

It will be found upon final analysis that the contention of our adversaries that this trade name is "false," "untruthful" and "misleading" is founded upon the botanical criterion. We have sufficiently considered the question of botanical identities in our brief in reply to the Commission. We have shown, as the Commission has indeed found, that trade and industry are not interested in botanical classification or botanical nomenclature but that their interest is in the quality and utility of the lumber. We have also shown that the botanical classification of *pine trees* is not a criterion for the commercial classification of *pine lumbers*. The two classifications have different objectives. The botanist classifies pine *trees* with respect to the number of needles in a bundle and the nature of the cones, bark and flowers. His criterion is found in plant characteristics. In this classification no consideration whatever is given either to the mechanical properties or the industrial utility of the lumber product. Trade and industry, on the other hand, classify *pine lumber* with respect to texture, quality and primary industrial use. It follows that the lumber manufacturer and the lumber merchant do not speak botanically when they give trade names to forest products. *A fortiori* neither the purchaser nor the consumer speaks botanically when ordering lumber under a common trade name. Hardly would it be contended that either botanical

nomenclature or botanical distinctions were in mind when the commercial names now common in the lumber trade came into being.

There can be no justification, either upon the record or without the record, for this persistent effort to identify the botanical classification of pine *trees* with the commercial nomenclature of pine *lumbers*. They have never been identical in point of fact, nor was there any suggestion that they should be identified until this controversy lately arose.

The Commission has perforce abandoned its apparent initial reliance upon botanical classification. At least its reliance on botany has been extensively qualified. *Amicus curiae* can hardly sustain a contention which is now thoroughly discredited. It is enough to say by way of summary that the expert witnesses who testified of record were agreed:

> *First,* that in the classification of pine trees by botanists no consideration was given either to the mechanical properties or the quality or utility of the lumber product;
>
> *Second,* that commercial nomenclature has never given heed to botanical identities or distinctions;
>
> *Third,* that the mechanical properties of California White Pine place it in the white pine group rather than in the yellow pine group;
>
> *Fourth,* that the industrial uses of California White Pine place it within the white pine group and not in the yellow pine group.

If anything further is needed in order to condemn the effort to force botanical classification as the guide for commercial nomenclature, it will be found in the following excerpt from Paragraph 62 of the Commission's findings in these proceedings:

> "The dealers, architects and consuming public are influenced by common names given to lumber products and not by the botanical names. They seldom know the

> Latin term for the respective species although of late there has been a tendency on the part of certain architects to use 'strobus' in their specifications of Northern white pine. Nor are these classes of buyers informed of or concerned over the purely botanical distinctions considered by scientists in the classification of species. They buy by common names and are concerned over distinctions between the characteristics of the lumber of the various species."

These findings on the part of the Commission afford a sufficient answer to the argument implicit in the brief of *amicus curiae* that botanical distinctions are significant in trade nomenclature.

Without any justification whatever, our adversaries seek to assimilate botanical classification to commercial classification. If these two matters could properly be assimilated, there might be small occasion for criticising this trade name. Inasmuch as such assimilation is not possible, our adversaries are patently confusing facts when they predicate the argument of misnomer upon botanical classification and identities.

III.

Current Meaning of "White Pine."

The Court will understand that today the term "white pine" does not mean the lumber from a single genus of pine tree, namely *Pinus strobus*. Indeed these complaints are avowedly brought in behalf of the lumber yielded by three distinct genera, one of which has never been marketed under a white pine name. For at least a third of a century, "white pine" has meant any one of four lumbers, separately identified by individual trade names.

The record affords convincing proof that a trade name which adheres to the botanical criterion may yet be misleading and dishonest in fact. The lumber of *Pinus lambertiana* has been marketed throughout the years as "sugar

pine". The tree is a "5-needle pine" and therefore is assigned to the white pine group. It grows almost entirely in California. The botanical argument suggests that this sugar pine lumber can most appropriately be sold as "California White Pine," and such may well be the program of our adversaries if they should prevail in their present effort to excise "white" from respondents' trade name. Thereby they would appropriate the good-will established by respondents through a generation of continuous use. Botany would justify the attempted appropriation, and yet it is agreed that that name would be misdescriptive, misleading and confusing in the highest degree. (R. 128) In short, "California White Pine" is a well established name for respondents' lumber and it would be nothing other than fraud to market "sugar pine" under the name "California White Pine."

IV.

The Word "California" in Respondents' Trade Name is Sufficiently Distinctive.

Respondents use the full name "California White Pine" and they desire to use that full name. The word "white" denotes the quality and utility of the lumber. The word "California" particularly identifies the lumber as a product distinct from Northern White Pine and Idaho White Pine and other competing lumbers. It is not the occasion of confusion; it rather serves to avoid confusion.

If the trade name "Idaho White Pine" is not calculated to confuse that lumber with "Northern White Pine", it is difficult to see wherein "California White Pine" should lead to confusion.

The record shows without conflict that "California White Pine" has been known to trade and industry for a generation and that purchasers know what they are getting under that name.

V.

Quality and Utility.

Further debate respecting relative quality and utility would be of doubtful assistance to this Court. It was to be expected that our adversaries would seek to disparage respondents' product, but we have noted that the Government experts do not sustain them. The Commission called a hearing at Madison, Wis., in order to get the testimony of the experts of the United States Forest Products Laboratory, but counsel for the Commission was frankly discomfited when he discovered that they were not prepared to give evidence in support of his contentions respecting wood quality, including durability. He expressed a preference for the omission of their testimony. (R. 703, 704.) Nevertheless, the testimony was received, and was found to be in no respect unfavorable to respondents' lumber.

We have protested in our brief in reply to the Commission against the refusal of Commission to report the results of the Government tests and the evidence given by the expert technologists. It is enough here to suggest that such evidence should take precedence over disparaging comments on the part of our adversaries. (Resp. Exhibits Nos. 21-23, 32. R. 778-780, 783-784, 1368-9.)

VI.

The Status of Competitors.

It will be granted that much of this lumber is now sold under the trade name "Pondosa Pine", a term of very recent origin. It is represented that those producers who have adopted the "pondosa" name are at a disadvantage. If so, it is because they have adopted a name which is meaningless to trade and industry. It fails to denote the properties and industrial utility of the lumber. It suggests neither white pine nor yellow pine. It is so wanting in the informative qualities which trade names should possess

that it is small wonder that "pondosa" manufacturers encounter difficulty in giving their product a proper place in the public mind. This is a problem which the "pondosa" manufacturers have created for themselves. Assuredly the act of these respondents in adopting "California White Pine" some 33 years ago cannot be regarded as the occasion for such difficulties as may now confront those who use the "pondosa" name.

As far as the manufacturers of "Northern White Pine" and "Idaho White Pine" are concerned, their chief grievance is that respondents' lumber has become a strong competitor of their product. It could not have become such a competitor except upon its merits. It will be found upon a careful review of the record that the alleged competitive disadvantages of "Northern White Pine" and "Idaho White Pine" are attributable to nothing other than the normal rivalry of competing lumbers in trade and industry. As Mr. Weyerhaeuser has testified, there has been a natural economic replacement of the older pine by the western pine. In brief the name "California White Pine" has not produced this alleged competitive disadvantage. The lumber itself is the competitor.

VII.

The Opinion of the Court Below.

We have sufficiently dealt with the essentials of the opinion of the court below in our major brief in this cause. We need not repeat that discussion.

As our adversaries would have it, the lower court was disposed to excuse misdescription for reasons which do not go to the merits of the controversy. A careful reading of the opinion of the court below will show that this characterization is not warranted. The grievance of our adversaries here is akin to the objections raised in the brief for the Federal Trade Commission. The court reported material facts which the Federal Trade Commission refrained

from reporting. In consideration of those facts and of the findings of the Commission, the conclusion was reached that respondents are not chargeable with unfair methods of competition forbidden by the Federal Trade Commission Act.

We think it immaterial that the opinion of the lower court referred to matters which the Federal Trade Commission ignored. Neither are we concerned with the reasoning of the court below. We understand that the case is now before this court on the merits and that if neither the record nor the findings of the Commission can sustain a charge of unfair methods of competition the orders of the Commission cannot be sustained.

The findings of the Commission will be searched in vain for facts requisite to the establishment of a case of unfair competition. The pertinent cases are reviewed in our brief in reply to the Commission, and need not be again reviewed here.

CONCLUSION.

The opposing brief goes beyond the facts of record when it characterizes this trade name as a "false designation" and when it represents that particular purchasers have been deceived. *There is no testimony on the part of any purchaser that he has been deceived by this trade name, and the Commission has made no findings to that end.*

The findings of fact actually made by the Commission cannot serve to make out a violation of law on the part of these respondents.

Respectfully submitted,

WARREN OLNEY, JR.,
ALLAN P. MATTHEW,
CARL I. WHEAT,
McCUTCHEN, OLNEY, MANNON & GREENE,
Balfour Building,
San Francisco, Calif.,
Attorneys for Respondents.

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